Supreme Court, U.S.
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No. 97-1399

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

RICHARD BLUMENTHAL, ATTORNEY GENERAL
OF CONNECTICUT

Petitioner,

—against—

PHILIP MORRIS, INC., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Where federal plaintiffs have brought a complaint challenging under the United States Constitution and federal law a state official's threatened attempt retroactively to shift massive costs of the state's own voluntarily-undertaken Medicaid program to them through a radical departure from established principles of law, must the federal court dismiss the federal complaint on *Younger* abstention grounds simply because the state official thereafter brings a state court lawsuit which — in *addition* to the claims for a monetary recovery of medical expenses paid challenged by the federal lawsuit — *also* asserts alleged "enforcement" claims which the State official self-servingly proclaims to be important, and notwithstanding that: (1) the alleged "enforcement" claims in the state lawsuit are conceded by the State official to be "unconnected" with the monetary recovery claims that are being challenged in the federal lawsuit; (2) the federal lawsuit does *not* seek to interfere with any such admittedly "unconnected" enforcement claims; and (3) even as to the purported "enforcement" claims with which the federal lawsuit does not seek to interfere, the state official fails to offer any evidence to support his assertions of importance and there is ample evidence in the record to the contrary?

LIST OF PARTIES

The plaintiffs in this action are Philip Morris Incorporated, R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation, and Lorillard Tobacco Company. The defendant is Richard Blumenthal, Attorney General of Connecticut.

The following is a list of respondents' parent companies and non-wholly owned subsidiaries, submitted pursuant to Supreme Court Rule 29.6.

Plaintiff-Respondent Philip Morris Incorporated has the following parent companies, subsidiaries, and affiliates that have issued shares to the public:

Philip Morris Companies Inc.

Plaintiff-Respondent R.J. Reynolds Tobacco Co. has the following parent companies, subsidiaries, and affiliates that have issued shares to the public:

RJR Nabisco Holdings Corp.
RJR Nabisco, Inc.
Nabisco Holdings Corp.

Plaintiff-Respondent Brown & Williamson Tobacco Corp. (including as successor by merger to The American Tobacco Company) has the following parent companies, subsidiaries, and affiliates that have issued shares to the public:

B.A.T Industries p.l.c.
Nobleza-Piccardo S.A.I.C. y F. (Argentina)
W.D. & H.O. Wills Holdings Limited (Australia)
British American Tobacco Bangladesh Tobacco Company Limited (Bangladesh)
Polo Industria and Comercia Ltda (Brazil)
Souza Cruz S.A. (Brazil)
B.A.T. Cameroun S.A. (Cameroon)
Imasco Limited (Canada)
Compania Chilena de Tabacos S.A.
Republic Tobacco Co. (Costa Rica)

Skandinavisk Tobakskompagni A/s (Denmark)
Cigarreria Morazan SA de CV (El Salvador)
Pioneer Tobacco Company Limited (Ghana)
Tabacalera Nacional, S.A. (Guatemala)
Demerara Tobacco Company Limited (Guyana)
Tabacalera Hondurena S.A. (Honduras)
BAT Pecsi Dohanygyar Kft (Hungary)
I.T.C. Limited (India)
VST Industries Limited (India)
P.T. BAT Indonesia (Indonesia)
Allied Dunbar International Specialist Funds p.l.c. (Ireland)
B.A.T. Kenya Limited (Kenya)
Threadneedle Global Assets SICAV (Luxembourg)
Malaysian Tobacco Company Berhad (Malaysia)
Tabacalera Nicaraguense SA (Nicaragua)
Nigerian Tobacco Company PLC (Nigeria)
Pakistan Tobacco Company Limited (Pakistan)
British American Tobacco — STF (Russia)
OJSC "British American Tobacco-Yava" (Russia)
Aureol Tobacco Company Limited (Sierra Leone)
British-American Tobacco Company (Singapore) Limited (Singapore)
British American Tobacco Holdings (South Africa) Limited
South African Eagle Insurance Company Limited (South Africa)
Ceylon Tobacco Company Limited (Sri Lanka)
CTC Eagle Insurance Company Limited (Sri Lanka)
British American Tobacco Switzerland S.A.
The West Indian Tobacco Company Limited (Trinidad & Tobago)
B.A.T. Zimbabwe Limited (Zimbabwe)

Plaintiff-Respondent Lorillard Tobacco Company has the following parent companies, subsidiaries, and affiliates that have issued shares to the public:

Loews Corporation, the indirect parent of Lorillard Tobacco Company.

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JURISDICTION

Petitioner asserts that he has "invoke[d] the jurisdiction of this Court under 28 U.S.C. § 1281(1)." Petition at 2. No such federal statute exists. It would appear, however, that 28 U.S.C. § 1254(1) would be applicable, albeit Petitioner does not cite to that statute. In any event, as shown in this brief, there is no reason for this Court to exercise jurisdiction in this case.

STATEMENT OF THE CASE

Although the Connecticut Attorney General barely mentions it and fails even to include it in his appendix, the complaint that is at issue in this action — which the Second Circuit upheld against a *Younger* abstention challenge — is the *federal* complaint filed by the plaintiff tobacco companies (the "Companies") against the Connecticut Attorney General. That complaint (the "Federal Complaint"):

- alleges that the Attorney General was threatening to bring a lawsuit (the "Threatened Lawsuit") "*seeking hundreds of millions of dollars from plaintiffs . . . to pay for Medicaid payments* that Connecticut voluntarily undertook to make to its Medicaid-eligible residents, wholly irrespective of whether plaintiffs would have any liability under established principles of law to pay for the medical care of any actual Medicaid recipient." RA 3 (at ¶ 9, emphasis added);
- alleges that "[t]he Threatened Lawsuit violates basic principles of constitutional law . . . [by] seek[ing] to impose upon plaintiffs . . . *massive costs of the Medicaid program that Connecticut has voluntarily chosen to establish, irrespective of traditional principles of law* governing the rights and duties of plaintiffs with respect to any actual Medicaid recipient." RA 6 (at ¶ 16, emphasis added); and
- seeks declaratory and permanent injunctive relief against the Attorney General "from prosecuting,

imposing or enforcing *liability*" pursuant to that Threatened Lawsuit. RA 27-28 (prayers for relief, emphasis added). *See also, e.g.*, RA 4-5 (¶ 12), RA 6 (¶ 17), RA 9-15 (¶¶ 25-41).[1]

As the Second Circuit recognized, for months preceding the filing of the Complaint, the Attorney General had been threatening to file a lawsuit against the Companies, seeking to hold them liable for hundreds of millions of dollars in health care payments voluntarily expended by Connecticut. *Philip Morris, Inc. v. Blumenthal*, 123 F.3d 103, 104 (2d Cir. 1997); *see* RA 3-6, 15-17 (Complaint ¶¶ 9-15, 41-47). Thus, "[i]n 1995, the Attorney General attempted to obtain legislative authorization for a lawsuit against the tobacco companies." 123 F.3d at 104. A bill that would have provided that desired authorization was introduced (1995 House Bill 6991), and the Attorney General himself appeared and gave testimony before the Judiciary Committee of the Connecticut General Assembly in support of it. JA266-75. But "[t]he Connecticut General Assembly declined to enact legislation authorizing such a suit." 123 F.3d at 104.

Once again, in March 1996, the Attorney General made an appearance before the General Assembly to give testimony in support of another bill that would have authorized him to file his threatened lawsuit against the tobacco companies (1996 House Bill 5817). 123 F.3d at 104; *see* RA 3-4 (Complaint ¶ 10); JA276-302. But once again, notwithstanding the Attorney General's personal appearance and support, the General Assembly denied authorization. 123 F.3d at 104; *see* RA 4, 15 (Complaint ¶¶ 11, 40).

"Notwithstanding the General Assembly's denial of authorization, the Attorney General made clear through the press that he intended to proceed with the legal action." 123 F.3d at 104. *See also* RA 16-17 (Complaint ¶¶ 43-46). As detailed in the

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[1] The Companies' Federal Complaint is attached hereto as Respondents' Appendix. Citations to Respondents' Appendix are labeled "RA"; citations to Petitioner's Appendix are labeled "PA"; and citations to the Joint Appendix that was before the Second Circuit are labeled "JA."

Companies' Federal Complaint, the press reported in the ensuing weeks and months following the failure of the proposed bills that, despite these legislative rejections, the Attorney General: "could file a lawsuit against the major tobacco companies within several weeks, seeking millions in repayment for Medicaid and Medicare expenses for tobacco-related illnesses"; that the lawsuit would seek "to recover for Connecticut taxpayers" health-care costs attributed to smoking, which defendant estimated as "$900 million"; that the Attorney General had "filed notices with newspapers across the state . . . seeking proposals for law firms to work with his office on the suit" on a contingency fee basis; and that the Attorney General "hope[d] to file the suit by late spring or early summer." RA 16-17 (Complaint ¶¶ 43-46).

The theory of the Attorney General's threatened lawsuit — without any precedent under Connecticut law — was that the Companies should bear Connecticut's health care costs allegedly associated with smoking: (1) without regard to whether the Companies would be liable, for health care costs or otherwise, to any individual smoker or other person (RA 3-5, 19 (Complaint ¶¶ 10, 12, 55)); (2) notwithstanding that both federal and Connecticut law expressly sanction tobacco products as a legal article of commerce, and that Connecticut has for many years taxed and itself sold cigarettes, garnering millions of dollars by doing so (RA 6-8 (Complaint ¶¶ 18-20); JA200-47); and (3) notwithstanding that the Attorney General was not purporting to sue the manufacturers of any other product on this basis, but rather was selectively asserting this extraordinary theory of liability against a certain disfavored industry (RA 2, 3, 18, 20 (Complaint ¶¶ 2, 9, 51, 59)). This massive and unprecedented liability, moreover, was to be imposed on both a retroactive and prospective basis. RA 3, 20 (Complaint ¶¶ 9, 59).

In his pre-suit press statements, the Attorney General presented his threatened lawsuit as one *seeking to recover money* purportedly for health care payments made by the State of Connecticut, arguing that Connecticut taxpayers should support his

lawsuit because it may produce a huge monetary recovery for their own benefit:

- March 19, 1996 press release: "Our goal is *simply to recover money* that taxpayers have paid for the health care costs of tobacco-related illnesses." JA260 (emphasis added).
- May 1, 1996 press release: "We are preparing to file a lawsuit that will demand *repayment for state expenses for tobacco-related illnesses*"; "the tobacco industry is responsible for *hundreds of millions of dollars in state expenses* . . . and we believe this lawsuit will succeed in bringing *millions of dollars back to taxpayers*." JA262 (emphasis added).
- July 1, 1996 press release: "Connecticut Attorney General Richard Blumenthal today blasted an attempt to block *Connecticut's effort to recoup hundreds of millions of taxpayer dollars spent on tobacco-related diseases*;" the Federal Complaint was an effort to "hamper our efforts *to recover money* rightly due the state of Connecticut." JA264 (emphasis added).

None of these pre-suit press releases so much as mentioned any non-monetary relief.[2]

As set forth in the Companies' Federal Complaint, the Attorney General's threatened lawsuit called into question the Companies' legal rights with respect to past, present, and future

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[2] Thus, the Attorney General has things exactly backwards when he suggests that the Companies somehow "pars[ed] the State's claims for relief and challenge[d] a portion of them . . . to avoid *Younger* abstention." (Petition at 17 n.6) The Companies filed their Federal Complaint first, and the Companies' Federal Complaint challenged the claims that the Attorney General had publicly threatened to bring: monetary claims seeking recovery of medical expenses paid. It was the Attorney General's complaint — obviously styled by his contingency fee counsel with an eye to buttressing his plea for *Younger* abstention — that for the first time interjected other claims in addition to the monetary claims seeking recovery of medical expenses paid challenged by the Federal Complaint.

sales of their products in Connecticut and necessarily affected their businesses on a going-forward basis. RA 17-18 (Complaint ¶48). Accordingly, as the Second Circuit observed, on June 28, 1996, the Companies brought this action in federal court seeking to vindicate their rights under the federal constitution and federal statutes with respect to " '[t]he [t]hreatened . . . impos[ition] upon [the Companies] on a retroactive basis massive costs of the Medicaid program that Connecticut has voluntarily chosen to establish, irrespective of traditional principles of law governing the rights and duties of [the Companies] with respect to any actual Medicaid recipient,' " and to "resolve questions about the consequences of their continuing to do business in Connecticut." 123 F.3d at 104 (quoting Federal Complaint); *see* RA 6, 17-18 (Complaint ¶¶ 16, 48).[3]

Three weeks after the Companies filed their Complaint, on July 18, 1996, the Attorney General carried through on his threats, filing a lawsuit in state court seeking (*inter alia*) an "award[ ] [of] actual damages and compensation to the State of Connecticut for past and future damages, including but not limited to health care expenditures." PA 127-132 (State Complaint Prayer for Relief, ¶¶ A, C-G). The Attorney General's state court complaint seeks to impose the massive retroactive and prospective health care cost liability which the Companies had previously challenged on federal constitutional grounds in this federal action.

In addition, the Attorney General added to his state court complaint purported "enforcement" claims seeking injunctive and other relief, claims which the Companies' federal action had *not* addressed. As the Attorney General conceded in his brief to the Second Circuit below, these aspects of his lawsuit which he claimed to be "sovereign [in] nature" are "*unconnected* with the State's . . . claim for recovery of its Medicaid payments" — *i.e.*, the only claim challenged by the federal lawsuit. Atty. Gen. 2d Cir. brief at 25-26. *See also* Petition at

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[3] The Companies' federal Constitutional claims are asserted, *inter alia*, under both 42 U.S.C. § 1983 and the federal Declaratory Judgments Act, 28 U.S.C. § 2201 *et seq.* *See* RA 1-2, 17-29.

14-15 ("The State's legal claims . . . *are independent of one another* and do not rise or fall together.") (emphasis added).

Despite the inclusion of certain non-monetary claims in his state court suit, the Attorney General's statements at his press conference held the day his suit was filed made clear that his "primary purpose" in bringing the suit was to seek to obtain a massive monetary recovery from the Companies, stating that the suit was "unprecedented, not only *in the amount of money* it is seeking to recover, but in the level of public interest *in winning damages* from the tobacco companies." JA253-54, JA257 (emphasis added). A news article reporting on that press conference stated that the suit sought $1 billion in damages and was "the largest civil lawsuit ever brought by the state of Connecticut." JA253.

Four days after filing his lawsuit in state court, the Attorney General moved to dismiss the Companies' Federal Complaint in this action, arguing that — by virtue of his having thereafter filed the threatened lawsuit in state court — the District Court was thereupon required to dismiss the Companies' Federal Complaint under the *Younger* abstention doctrine.

While the Petition asserts that the Companies "took [no] action in federal court thereafter to pursue their claims" (Petition at 3), the only reason why the Companies' federal lawsuit has not progressed beyond the complaint stage is that there has been no answer and, but three weeks after the Companies filed their Complaint, the Attorney General moved to dismiss it on *Younger* abstention grounds. Until the Attorney General's motion was resolved, the Companies could not proceed to move for summary judgment on their preemption claims (which the Companies had planned to do). Accordingly, the fact that the Companies' lawsuit has not progressed beyond the complaint stage is not due to some litigation strategy of the Companies, but rather is due to the litigation strategy of the Attorney General.[4]

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[4] Even if it were somehow applicable (and the Second Circuit held that it is *not*), *Younger* abstention could have been waived by the State. *See Morales* v. *Trans World Airlines*, 504 U.S. 374, 381 n.1 (1992).

(footnote continued)

On December 23, 1996, the District Court (without oral argument or a hearing) dismissed the Companies' Complaint on *Younger* abstention grounds. PA 14-23. The District Court's decision was contrary to the decision just one month earlier in *Philip Morris, Inc.* v. *Harshbarger*, 946 F. Supp. 1067 (D. Mass. 1996), which held that *Younger* abstention was *not* applicable to the substantially identical federal lawsuit filed by the Companies against the Attorney General of Massachusetts.

The Companies appealed the Connecticut District Court's decision to the United States Court of Appeals for the Second Circuit, which unanimously reversed. *Philip Morris, Inc.* v. *Blumenthal*, 123 F.3d 103 (2d Cir. 1997). The Second Circuit began its analysis by noting the limited scope of the Companies' Federal Complaint:

> The Tobacco Companies challenged on constitutional grounds *aspects* of the relief that the state intended to pursue. In particular, they challenged *the recovery of Medicaid payments made by Connecticut* in connection with illnesses that allegedly are tobacco-related, and they sought to resolve questions about the consequences of their continuing to do business in Connecticut during the pendency of the threatened suit.
>
> * * *
>
> In the instant case, the Tobacco Companies seek a federal court injunction prohibiting the state *from collecting from them monies expended by the state* for treatment of smoking-related illnesses. (*Id.* at 104-06 (emphasis added).)

Thus, the Attorney General could have chosen to litigate the Companies' constitutional claims on their merits in the federal courts. Plainly, the Attorney General hopes to avoid federal court scrutiny of his threatened imposition upon the Companies of Connecticut's health care costs.

Similarly, while the Attorney General seeks to buttress his *Younger* abstention argument by observing that the Companies did not seek a preliminary injunction in their lawsuit (Petition at 3), it is difficult to see how the fact that the Companies sought *less* interference with the state proceedings can somehow render *Younger more* applicable, and the Attorney General cites no authorities in support of such an illogical proposition.

While the Attorney General argued below (and assumes in his Petition) that the Companies' Federal Complaint should instead be construed as seeking more "sweeping" relief (*see* Petition at 17 n.6), the Second Circuit held that "read in context" the Complaint could not be so broadly construed. 123 F.3d at 106 n.2.

Having properly started by determining the scope of the Companies' Federal Complaint, the Second Circuit went on to "consider the underlying nature of the state proceeding *on which the federal lawsuit would impinge*." *Id.* at 106 (emphasis added). The Court concluded that "the *federal action* [does not] implicate[ ] an important state interest within the meaning of *Younger*," *id.* at 105-06 (emphasis added), applying the "generic proceeding" test set forth in *New Orleans Pub. Serv., Inc.* v. *Council of New Orleans*, 491 U.S. 350, 365 (1989) ("NOPSI"). In so holding, the Court examined the generic nature of only those aspects of the state lawsuit with which the Federal Complaint would interfere, and concluded that such claims are "more accurately classified as a subrogation action grounded in tort," which "is not a generic proceeding of great importance to the state." 123 F.3d at 106.

Accordingly, the Second Circuit unanimously held that *Younger* abstention did not apply, reversed the District Court's decision and remanded the action to the District Court. The Second Circuit added that "[u]pon remand, the district court, in its discretion, may consider whether abstention is appropriate under the *Pullman* doctrine." *Id.* at 107.

The Attorney General filed a petition before the Second Circuit seeking panel rehearing or rehearing en banc, but that petition was denied with no judge of the Second Circuit having voted for panel rehearing or en banc review.[5]

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[5] At the request of the Attorney General, the Second Circuit stayed issuance of its mandate pending resolution by this Court of the Attorney General's Petition for Certiorari. Accordingly, no further proceedings in the District Court have yet taken place, and the District Court has yet to consider whether *Pullman* abstention might be applicable to some or all of plaintiffs' claims.

REASONS FOR DENYING THE WRIT

A. This Case Does Not Present the Questions that Petitioner Contends It Presents

This case does not merit certiorari review for several reasons. First, and most fundamentally, this case simply does not present the questions that Petitioner contends it presents.

According to Petitioner, this case raises various issues concerning the extent to which a federal court can recharacterize or reject the basis of a State's state court pleading in determining whether *Younger* abstention applies. However, the Petition misapprehends and mischaracterizes the decision by the Second Circuit. The Second Circuit did *not*, as Petitioner asserts in his Questions Presented, "disregard," "recharacterize," or "reject the basis of" the State's complaint (*see* Petition, Questions Presented Nos. 1-4). Rather, what the Second Circuit did was to analyze the scope of the *Companies' Federal Complaint*, and to determine whether the aspects of the State lawsuit with which the Federal Complaint would interfere — namely, the State's attempt to obtain a monetary recovery in favor of itself of medical expenses paid — implicated an important state interest for *Younger* purposes.

Petitioner's *mis*understanding of the Second Circuit's decision is illustrated at page 11 of the Petition, where Petitioner assumes the Second Circuit's decision contains a typographical error when the Second Circuit states: "we do not find that the *federal* [sic] action implicates an important state interest within the meaning of *Younger*." Petition at 11 (emphasis added) (quoting 123 F.3d at 105). The word "federal" in that quote is not a typographical error: rather, it reflects the Second Circuit's assessment that the scope of the *Companies' Federal Complaint* was limited to enjoining the State from imposing monetary liability upon the Companies in favor of itself on account of medical expenses paid. The Second Circuit did *not* "disregard," "recharacterize" or "reject" the other aspects of the State's lawsuit; rather, it simply analyzed the Companies' Federal Complaint, and correctly observed that it does not

interfere with the nonmonetary alleged "enforcement" aspects of the State's lawsuit. 123 F.3d at 105-06 & n.2.[6]

While Petitioner contends in a footnote that the Second Circuit's interpretation of the scope of the Companies' Federal Complaint is wrong (Petition at 17, n.6), and that the Companies' Complaint should instead be construed as being "much more sweeping," the Petitioner has not asked this Court to review the Second Circuit's interpretation of the Companies' Federal Complaint, and the interpretation by the Second Circuit of the Companies' Federal Complaint hardly warrants certiorari review by this Court. *See Philip Morris, Inc.* v. *Blumenthal*, 123 F.3d at 106 n.2 (2d Cir. 1997).

Accordingly, this case simply does not present the issues Petitioner contends it presents, and therefore this case is an inappropriate vehicle to consider such questions.

B. Petitioner Has Failed to Show that the Court of Appeals Rendered a Decision in Conflict with Any Decision of this Court or Other Court of Appeals

1. No Conflict with Any Decision of Other Court of Appeals

Petitioner does not contend — nor could he — that the decision of the Second Circuit is in conflict with any decision by any other Court of Appeals. Quite to the contrary, by focusing on the scope of the Companies' Federal Complaint, and seeking to determine whether the Federal Complaint would interfere with important state interests, the Second Circuit's

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[6] Notably, in his Petition for Panel Rehearing or Rehearing en banc submitted to the Second Circuit, the Attorney General did *not* contend that the word "federal" in the passage of the Second Circuit opinion quoted in the Petition (at 11) reflected a typographical error. Petition for Rehearing p. 5 (quoting same language but *without* noting or arguing that this language contained typographical error). If the Attorney General believed that the Second Circuit's opinion contained a typographical error, it was incumbent upon him to raise that in his Petition for Rehearing. The Attorney General's failure to do so only highlights the presumptuousness of his incorrect assumption that the use of the word "federal" by the Second Circuit was a typographical error.

decision is consistent with the decisions of the other Circuits. *See Gwynedd Properties, Inc.* v. *Lower Gwynedd Township*, 970 F.2d 1195, 1202-03 (3d Cir. 1992) ("the second prong of the *Younger* test has not been met as the *federal action does not interfere* with state proceedings implicating important state interests") (emphasis added); *AFSCME* v. *Tristano*, 898 F.2d 1302, 1305 (7th Cir. 1990) (same); *Planned Parenthood League of Massachusetts* v. *Bellotti*, 868 F.2d 459, 467 (1st Cir. 1989) (same); *International Longshoremen's Ass'n* v. *The Waterfront Commission of New York Harbor*, 495 F. Supp. 1101, 1111 (S.D.N.Y. 1980) (same), *aff'd in part and rev'd in part on other grounds*, 642 F.2d 666 (2d Cir.), *cert. denied*, 454 U.S. 966 (1981); *Philip Morris, Inc.* v. *Harshbarger*, 946 F. Supp. 1067, 1076-78 (D. Mass. 1996) (same).[7]

These decisions in turn reflect this Court's teaching that the fundamental touchstone of *Younger* abstention is the avoidance of *federal court interference* with vital state interests. *See Middlesex County Ethics Comm.* v. *Garden State Bar Ass'n*, 457 U.S. 423, 434-35 & n.12 (1982) ("the salient fact" for *Younger* abstention "is whether federal-court interference would unduly *interfere*" with important state interest; state must have important interest "in the pending state judicial proceedings *and in the federal case*") (emphasis added); *Quackenbush* v. *Allstate Ins. Co.*, 116 S. Ct. 1712, 1721 (1996) (under *Younger*, "federal courts have the power to refrain from hearing cases that would *interfere* with a pending state criminal proceeding or with certain types of state civil proceedings") (emphasis added). Since *Younger* abstention by definition thus cannot be predicated upon aspects of the Attorney General's state lawsuit with which the Federal Complaint would not interfere, the Second Circuit

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[7] Recently, a District Court in Alaska — albeit acknowledging that all other decisions had reached a contrary conclusion — applied *Younger* abstention to a complaint filed by the tobacco companies against the Alaska Attorney General. *Philip Morris, Inc.* v. *Botelho*, No. A97-0003-CV (HRH) (D. Alaska Apr. 15, 1998). The Companies have appealed that decision to the Ninth Circuit. Should the Ninth Circuit affirm the District of Alaska's decision, there may then be a division among the Circuits that could warrant review by this Court. Such a division among the Circuits, however, has not developed.

properly focused on those aspects of the state proceeding with which the Federal Complaint does seek to interfere — *i.e.*, claims seeking monetary recovery for medical expenses paid.[8]

Petitioner also contends that the Second Circuit "reject[ed] the basis of" his Complaint, because the common law Medicaid recovery claims asserted by the State are not subrogation claims, but rather purport to "seek damages for direct harm to the State caused by the tobacco companies' conduct." Petition at 13. However, contrary to Petitioner's assertion, the Second Circuit did *not* "decide state law questions" (Petition at 11, 14) or rule that the State's Medicaid recovery claims *were* subrogation claims, but rather ruled that the *generic nature* of such claims "is more accurately *classified* as a subrogation action grounded in tort." *Philip Morris, Inc.* v. *Blumenthal*, 123 F.3d at 106 (emphasis added). The Second Circuit elaborated: "This action, *like* a subrogation action, primarily concerns the apportionment of loss based upon theories of tort liability — who should be responsible for paying for the injuries suffered by those who contracted tobacco-related illnesses." 123 F.3d at 107 (emphasis added). Accordingly, the Second Circuit concluded, *Younger* abstention did not apply.[9]

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[8] Thus, the Attorney General's argument that *Younger* abstention is warranted because his state court complaint seeks certain non-monetary relief that is similar to various elements of the national Proposed Resolution dated June 20, 1997 signed by the Companies and certain attorneys general (including Petitioner) is without merit. The Attorney General's argument ignores that, as the Second Circuit found, the Companies' Federal Complaint simply does not seek to interfere with any such non-monetary claims. In any event, the fact that the State's lawsuit covers an area in which the federal government has extensively regulated (*i.e.*, the advertising and promotion of cigarettes, *see, e.g.*, 15 U.S.C. § 1331 et seq.) militates against, rather than in favor of, *Younger* abstention. *See Ayers* v. *Philadelphia Housing Authority*, 908 F.2d 1184, 1186, 1195 n.21 (3d Cir. 1990) (*Younger in*applicable to federal action challenging housing authority's state court eviction proceeding which related to housing program subject to "detailed federal regulation"; "whatever the state's interest may be in regulating proceedings which result in removal of citizens from their homes, it cannot supersede the relevant federal interests in governing the expenditure of federal funds for . . . HUD housing programs.").

[9] In his principal Second Circuit brief and again in his petition seeking panel rehearing or rehearing en banc, the Attorney General repeat-

In so holding, the Second Circuit came to the same conclusion as did the District of Massachusetts with respect to the virtually identical federal complaint filed by the tobacco companies against the Massachusetts Attorney General. The Massachusetts District Court likewise held that the generic nature of Massachusetts' claims against the tobacco companies seeking monetary recovery for medical expenses paid did not implicate important state interests, reasoning that:

> Under both federal and state statutes, Massachusetts is required to pursue liable third parties for amounts paid on behalf of Medicaid beneficiaries. In suing the cigarette manufacturers for the cost of treating diseases caused by smoking, Massachusetts is seeking a remedy that is *classically in the nature of subrogation*. (*Philip Morris, Inc.* v. *Harshbarger*, 946 F. Supp. 1067, 1077 (D. Mass. 1996) (emphasis added).)[10]

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edly pointed out that his state court complaint does not plead subrogation claims, but rather "seeks damages for *direct harm* to the State *caused by the tobacco companies' conduct*." Atty. Gen. Pet. Reh'g at 7 (emphasis in original); *see also, e.g.*, Atty. Gen. 2d Cir. brief at 30 ("Connecticut's state court action is not based . . . on any . . . right of subrogation"). Accordingly, the Attorney General's argument that the Second Circuit was under a "misunderstanding" as to his claims (*e.g.*, Petition at 15) — apart from being totally belied by the language of the Second Circuit's decision — is totally fallacious.

[10] Petitioner's attempt to distinguish *Harshbarger* from the case at bar (Petition at 14, n.5), echoed in the Amicus brief (at pp. 6-7, n.6), is without merit. In the first place, Petitioner incorrectly asserts that the Massachusetts District Court described the Massachusetts action "as merely 'a suit for money damages.' " Petition at 14, n.5. Quite to the contrary, the Massachusetts District Court expressly recognized that the Massachusetts Complaint sought "both monetary damages *and injunctive relief*." *Massachusetts* v. *Philip Morris, Inc.*, 942 F. Supp. 690, 692 (D. Mass. 1996) (emphasis added). And in the oral argument before the Massachusetts District Court, counsel for the Massachusetts Attorney General emphasized that Massachusetts was not only seeking a monetary recovery for medical expenses paid, but was also seeking "four types of injunctive relief" (the same types of injunctive relief that Connecticut seeks) and was purporting to protect the "vital interest in the health and safety of Massachusetts consumers." JA667-68.

Moreover, just one week after oral argument on the Massachusetts *Younger* abstention motion (and over three months before the Massa-

Accord City and County of San Francisco v. *Philip Morris, Inc.*, 957 F. Supp. 1130, 1135 (N.D. Cal. 1997) (Court, in upholding the retention of contingency fee counsel by the City and County of San Francisco in its health care cost recovery suit against the Companies, stated that "[p]laintiffs' role in this suit is that of a tort victim, rather than a sovereign.")

2. No Conflict with Any Decision of this Court

Likewise, the Second Circuit's decision does not conflict in any way with the decisions of this Court. Petitioner's contention that the Second Circuit only "pa[id] lip service" (Petition at 12) to the "generic proceedings" standard set forth by this Court in *NOPSI* v. *Council of New Orleans*, 491 U.S. 350, 365 (1989), is totally unsupported and is belied by the Second Circuit's decision. As this Court stated in *NOPSI*, "when we inquire into the substantiality of the State's interest . . . we do not look narrowly to its interest in the outcome of the particular case . . . . In *Younger*, for example, we did not consult California's interest in prohibiting John Harris from distributing handbills." 491 U.S. at 365.

It is clear that the Second Circuit followed the "generic proceedings" standard set forth in *NOPSI*. *See* 123 F.3d at 106. As the Second Circuit stated: " '[W]e do not look narrowly to [the State's] interest in the outcome of the particular case', but rather look to 'the importance of the generic proceedings to the

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chusetts District Court's decision), Massachusetts amended its complaint to add its Consumer Protection Act claim. If the simple mechanism of adding a Consumer Protection Act claim were even arguably the "magic bullet" of *Younger* abstention that the Attorney General here claims (and that the Massachusetts Attorney General claims in his Amicus brief), one might have expected the Massachusetts Attorney General to have submitted his amended complaint to the Massachusetts District Court in the three months that passed after his amendment of his complaint until the District Court rendered its decision. Yet he did not do so.

Finally, and even more fundamentally, the Attorney General's attempt to distinguish *Harshbarger* totally ignores that the *federal* complaints filed by the Companies in Massachusetts and Connecticut are substantially the same and, as the Second Circuit recognized, seek only to interfere with claims for a monetary recovery of medical expenses paid.

State'. . . . In order to ascertain the 'generic proceeding' involved . . . [w]e must consider the underlying nature of the state proceeding on which the federal lawsuit would impinge." *Id.* (citing *NOPSI*, 491 U.S. at 365.). Thus, the Second Circuit looked not to the fact that the State's claims are asserted against tobacco companies, but rather looked to the generic nature of the claims with which the federal complaint would interfere — claims seeking a monetary recovery of medical expenses paid — and properly determined that such claims do not implicate important state interests, but rather "primarily concern[ ] the apportionment of loss based upon theories of tort liability — who should be responsible for paying for the injuries suffered by those who contracted tobacco-related illnesses." *Philip Morris, Inc.* v. *Blumenthal*, 123 F.3d at 107. *Accord Philip Morris, Inc.* v. *Harshbarger*, 946 F. Supp. 1067, 1077 (D. Mass. 1996) ("The question is whether [the] interest [in] recouping from liable third parties money paid to Medicaid beneficiaries . . . is within the zone of 'vital state interests' to which the *Younger* doctrine gives its special recognition").

In concluding that monetary claims seeking recovery of medical expenses paid do not implicate important state interests, the Second Circuit was unquestionably correct. Many private parties have also brought claims for recovery of medical expenses paid — insurance companies, health care funds, and others. Claims to recover medical expenses paid do not become transformed into claims which implicate important state interests so as to warrant invocation of *Younger* abstention and abdication of federal jurisdiction over federal claims simply because the State is the plaintiff suing to recover money for itself. As the Second Circuit noted:

> The monetary relief sought by the state also would be available to a private citizen. Connecticut General Statutes § 42-110g provides that any private party may seek to recover actual damages suffered as a result of alleged CUTPA violations (as the state seeks to do in the instant action) and, in its discretion, the court may also award the private party punitive damages and equitable relief. Sim-

> ilarly, while the state is empowered under Connecticut General Statutes § 35-32 to bring actions in the name of the state or as parens patriae for violations of the state antitrust laws, and is entitled to recover treble damages, Connecticut General Statutes § 35-35 also entitles private parties to recover treble damages on their own behalf for antitrust violations. Thus, on its face, the state action does not appear to differ greatly from a private action under CUTPA, and the mere fact that the state is involved as a party does not transform the action into a "sovereign enforcement" proceeding. (123 F.3d at 106-07.)

Accord, e.g., *Cate* v. *Oldham*, 707 F.2d 1176, 1183 (11th Cir. 1983) ("Application of the *Younger* doctrine to ongoing state civil proceedings has been limited to those civil actions in aid of criminal jurisdiction or involving enforcement-type proceedings in which vital interests of the state qua state are involved"; *Younger* abstention did not apply because "[t]he state and the state official as plaintiffs in the [state court] action serve no function different from that of private plaintiffs"); *Mobil Oil Corp.* v. *City of Long Beach*, 772 F.2d 534, 542 (9th Cir. 1985) (*Younger* abstention inapplicable because "[t]he only state interest . . . assert[ed] is [a] claim for money damages, which is clearly insufficient to support dismissal"); *see also Quackenbush* v. *Allstate Ins. Co.*, 116 S. Ct. 1712, 1727 (1996) (refusing to abstain under *Burford* in favor of damages lawsuit state official had brought in state court, pronouncing the "state['s] interests" in "seeking damages" to be "run-of-the-mill" rather than important).

Nor is the Second Circuit's unanimous decision in any way inconsistent with this Court's decision in *Trainor* v. *Hernandez*, 431 U.S. 434 (1977). In *Trainor*, this Court applied *Younger* abstention in favor of a state civil enforcement action and resulting attachment proceeding against a person who had committed fraud on the state authorities by making false and fraudulent statements in a welfare application. *See id.* at 436-38. *Trainor* does not remotely, as the Attorney General contends, mandate *Younger* abstention when a state is seeking to recover money for one of its "public assistance" programs.

As the Second Circuit recognized, this Court's rationale for invoking *Younger* abstention in the *Trainor* case was that the state was seeking " 'to safeguard[ ] the fiscal integrity of [its public assistance] programs' " against a person who had "fraudulently concealed assets when applying for welfare benefits." *Philip Morris, Inc.* v. *Blumenthal*, 123 F.3d at 107 (*quoting Trainor*, 431 U.S. at 444). Moreover, as the Second Circuit also recognized, this Court relied heavily upon the fact that "the State might have elected to pursue . . . a criminal prosecution" in *Trainor*, 123 F.3d at 107 (citing *Trainor*, 431 U.S. at 443-44 (plurality opinion)), and that for Justice Blackmun, who cast the crucial fifth vote breaking a 4-4 tie, the fact that "the State had the option of proceeding either civilly or criminally" under the circumstances was critical. *Trainor*, 431 U.S. at 449 (Blackmun, J., concurring).[11]

As the Second Circuit thus correctly reasoned in distinguishing *Trainor*:

> The instant case does not involve a threat to the "fiscal integrity" of Connecticut's Medicaid program because no fraud has been committed against that program. There is no suggestion that any individual who received Medicaid benefits in relation to a tobacco-related illness was not entitled to those benefits. The mere fact that conduct results in expense to a state program is not enough to bring an action to terminate that conduct within the scope of *Trainor*. Nor can every initiative by a state to improve fiscal soundness by getting money be deemed a safeguard of "fiscal integrity." (123 F.3d at 107.)

The District of Massachusetts reached the same conclusion in the *Harshbarger* case:

> The Court's language in *Trainor* indicates that it did not mean to extend *Younger* to cover every kind of state suit to recover money paid out under public assistance programs. Both the opinion of the Court, subscribed by four

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[11] Here, of course, no criminal statute is even claimed to authorize the Attorney General's claims for monetary (or any other) relief.

> Justices, and Justice Blackmun's concurrence emphasized that Illinois was pursuing through civil means interests it might have chosen to vindicate through a criminal prosecution. *Trainor*, 431 U.S. at 444, 449-50 (Blackmun, J., concurring). In the Court's view, Illinois was acting in its traditional sovereign role to protect its programs against fraudulent claims. (946 F. Supp. at 1077).

Thus, the Second Circuit's decision is not remotely inconsistent with this Court's decision in *Trainor*.

Nor is the argument presented in the Amicus Curiae brief filed by the State of Massachusetts (on behalf of itself and other states) that the Second Circuit's decision is inconsistent with decisions of this Court persuasive. The Amicus brief asserts that "[t]his Court has never held that where a State brought a judicial proceeding, the state interest was of insufficient magnitude to justify *Younger* abstention." Amicus Brief at 5. However, this Court has *repeatedly* rejected the notion "that every pending proceeding between a State and a federal plaintiff" warrants *Younger* abstention, holding that in civil cases this is not even "remotely" the case. *NOPSI*, 491 U.S. at 368; *Moore* v. *Sims*, 442 U.S. 415, 423 n.8 (1979).

As the District of Massachusetts recognized in rejecting a *Younger* abstention argument with respect to a substantially identical federal complaint filed by the tobacco companies against the Massachusetts Attorney General, the position urged by the Massachusetts Attorney General is contrary to this Court's repeated admonitions that *Younger* abstention applies "only [in] exceptional circumstances," and "remains the exception, not the rule." *NOPSI*, 491 U.S. at 359, 368. *See also Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 813 (1976); *Quackenbush* v. *Allstate Ins. Co.*, 116 S. Ct. 1712, 1720-21 (1996). As the Massachusetts District Court aptly put it: "To apply the *Younger* doctrine and abstain in the present case would go a long way toward reversing that relationship and making abstention the rule, not the exception." *Philip Morris, Inc.* v. *Harshbarger*, 946 F. Supp. 1067, 1078 (D. Mass. 1996).

Moreover, it is noteworthy that while the Massachusetts Attorney General has submitted an Amicus Curiae brief in this case urging Supreme Court review of the *Younger* abstention issue, he did *not* take any steps to appeal to the First Circuit (by seeking certification or otherwise) the District of Massachusetts' similar decision rejecting *Younger* abstention. The Massachusetts Attorney General's argument that the *Younger* abstention issue merits certiorari review by this Court rings hollow in light of his failure even to seek First Circuit review of the similar decision against him rendered by the Massachusetts District Court.[12]

More generally, the Amicus brief suffers from many of the same infirmities as does the Petition. Thus, like the Petition, the Amicus brief mischaracterizes the Second Circuit's decision, trumpets aspects of the state lawsuit with which the federal complaint would *not* interfere, and fails to come to grips with the Second Circuit's determination that the scope of the Companies' Federal Complaint is limited to the State's attempt to obtain a monetary recovery in favor of itself for medical expenses paid. *See*, *e.g.*, Amicus Brief at 4 ("The Court of Appeal's [sic] re-casting of the State's case . . ."); *id.* at 12 ("the relief requested in the state proceeding goes well beyond the simple reimbursement of funds to the State, but also includes injunctive relief"); *id.* at 6 ("The Court of Appeals . . . misinterpret[ed] the State complaint," which did not assert "subrogation claims").

* * *

Accordingly, since the Second Circuit's decision is not in conflict with any decision of this Court or other Court of Appeals, certiorari review is not warranted.

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[12] The incongruity in the Massachusetts Attorney General's positions cannot be explained by the fact that, as discussed in Section C below, the Massachusetts District Court applied *Pullman* abstention to stay the Companies' federal lawsuit. Here, the Second Circuit has likewise expressly instructed that "[u]pon remand, the district court, in its discretion, may consider whether abstention is appropriate under the *Pullman* doctrine." 123 F.3d 107.

C. This Case Would in Any Event Be an Inappropriate Vehicle for Review of Any Issues Petitioner Contends It Presents Because the Second Circuit Has Remanded for Consideration of Pullman Abstention

The Petition fails to mention that the Second Circuit remanded to the District Court with the instruction that "[u]pon remand, the district court, in its discretion, may consider whether abstention is appropriate under the *Pullman* doctrine." 123 F.3d 107. Thus, it is possible that, upon remand, the District Court will nevertheless determine to abstain as to some or all of plaintiffs' federal claims under the *Pullman* abstention doctrine. In the similar case filed by the Companies against the Massachusetts Attorney General, the Massachusetts District Court determined that *Pullman* abstention was applicable to all of the Companies' claims. *Philip Morris, Inc.* v. *Harshbarger*, 946 F. Supp. 1067, 1078-79 (D. Mass. 1996).

Accordingly, inasmuch as the District Court has yet to consider whether abstention may nonetheless be appropriate under the *Pullman* doctrine, the procedural posture of this case in any event makes it inappropriate for review of the Second Circuit's determination that *Younger* abstention did not apply.

D. The Petition Mischaracterizes the Record Below

Finally, the Petition significantly mischaracterizes the record below. Thus, Petitioner asserts that "[t]he only evidence of record" in the courts below as to whether the Companies' Federal Complaint implicated important state interests was "the State of Connecticut's state court complaint." Petition at 15. *See also* Amicus Brief at 10. Quite to the contrary, however, defendants offered ample evidence below — which went entirely unrebutted — showing that the aspect of the state's suit with which the Companies' Federal Complaint seeks to interfere — monetary recovery for medical expenses paid — does *not* implicate important state interests sufficient to trigger *Younger* abstention.

As noted above (pp. 3-4), in his pre-suit press statements the Attorney General himself presented his lawsuit as one only

seeking to recover money, arguing that Connecticut residents should support his lawsuit because it may produce a huge monetary recovery for their own benefit. JA260-65. None of his pre-suit press releases even mentioned non-monetary relief. *Id.*

Moreover, in his July 18, 1996 press conference announcing the filing of his lawsuit, the Attorney General continued to make clear that the centerpoint of his suit was to get money from "Big Tobacco," stating that the suit was "unprecedented, not only *in the amount of money* it is seeking to recover, but in the level of public interest in *winning damages* from the tobacco companies." JA253-54 (emphasis added). A news article reporting on that press conference stated that the suit sought $1 *billion* in damages and was "the largest civil lawsuit ever brought by the State of Connecticut." JA253.

As shown by the Companies below, the materials distributed by the Attorney General at his July 1996 press conference announcing his lawsuit were even more blunt:

- Under the heading "What is the State of Connecticut Seeking in this Lawsuit?," the Attorney General stated: "The State of Connecticut *is seeking to recover the more than $100 million* paid each year by the state through the Medicaid Program and other taxpayer-funded health programs to treat tobacco-related illnesses." JA256 (emphasis added).
- Under the heading "If the Suit is Successful, How Will Taxpayers Benefit?," the Attorney General stated: "*A primary purpose* of the suit is *recovery of Medicaid funds* spent by the State of Connecticut. These Medicaid funds come from tax revenues. If the case is successful, it could result in lower health care costs for all Connecticut taxpayers." JA257 (emphasis added).
- Under the heading "Why Should Citizens Support This Lawsuit?," the Attorney General stated: "*The aim of this lawsuit is to make the tobacco industry pay* for the damages it has caused. Any damage

awards recovered in this suit will benefit state taxpayers." JA258 (emphasis added).

Indeed, the Attorney General has gone so far as to sign on private law firms to prosecute his lawsuit on a contingency-fee basis. JA303-06. The Attorney General's contingency-fee agreement with those lawyers, which was also part of the record below, makes clear that, absent an outside source of fees (via a court order or legislative procurement), the "compensation and reimbursement [due the lawyers] . . . is contingent upon *a monetary recovery* being obtained." JA304-05 (emphasis added).

Beyond this, there are other reasons to be skeptical of the Attorney General's purely conclusory assertion that the monetary claims in his state court lawsuit promote the central sovereign functions of the state. As noted above, prior to instituting his lawsuit, the Attorney General twice sought direct authority to bring an action against tobacco companies for monetary recovery of medical expenses paid from the Connecticut General Assembly, to the point of personally giving testimony in support of each of two proposed bills. JA266-302. The General Assembly's refusal to enact those bills is contrary to the Attorney General's self-serving "important state interests" proclamations. *See generally Tileston* v. *Ullman*, 26 A.2d 582, 587 (Conn. 1942); *Blue Cross and Blue Shield of Connecticut, Inc.* v. *Mike*, 439 A.2d 1026, 1031 (Conn. 1981).

Moreover, as is set forth in the Companies' Federal Complaint, for more than 30 years, Connecticut has been making payments under the Medicaid program without so much as seeking to recoup a single payment from any of the Companies; for an even longer period still, Connecticut has officially sanctioned and chosen to collect enormous revenue benefits from the tobacco industry — a minimum of $2 *billion* in tax collection benefits from cigarette sales since the State's participation in Medicaid began. *See* RA 7 (Complaint ¶ 19); JA213. Further, as the Companies also demonstrated below, the State has chosen to invest and continues to hold approximately $100 million of its pension fund investments in tobacco company

securities, and the State itself has long caused tobacco products to be offered for sale in many office buildings, restaurants and other state facilities throughout the state. JA307-14, JA331, JA360, JA206-07, JA201-02.[13]

The Attorney General failed to rebut any of this evidence. Nor did the Attorney General present any evidence showing how the "state interests" he purports to assert in his lawsuit — while *not* being substantial enough (a) to convince the General Assembly to adopt either of the bills that would have purported to authorize his claims against the Companies seeking monetary recovery of medical expenses paid; (b) to motivate the State to file such a lawsuit for a quarter-century; (c) to cause the State now to end its association with the tobacco industry; (d) to cause the State to divest its substantial tobacco stock investments; or even (e) to induce the State now to stop causing cigarettes to be sold and displayed for sale at its own facilities — are nonetheless somehow important state interests sufficient to require *Younger* abstention and to mandate the abdication of jurisdiction over the Companies' federal action seeking to enjoin the State's attempt to obtain a monetary recovery for itself on account of medical expenses paid.

Thus, the Petition totally mischaracterizes the record below, and certiorari review by this Court is not merited for this further reason as well.

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[13] It is well settled that "[i]n deciding whether abstention is appropriate . . . , the Court must . . . accept the truth of all well-pleaded allegations [in the federal complaint] and make all possible inferences in favor of the [federal] plaintiff." *Strasen* v. *Strasen*, 897 F. Supp. 1179, 1184 (E.D. Wis. 1995). *See also, e.g., DeLoreto* v. *Ment*, 944 F. Supp. 1023, 1027 (D. Conn. 1996).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil Action No.: 396CV01221

June 28, 1996

PHILIP MORRIS INCORPORATED, R.J. REYNOLDS TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORPORATION, LORILLARD TOBACCO COMPANY,

Plaintiffs,

—VS.—

RICHARD BLUMENTHAL,
ATTORNEY GENERAL OF CONNECTICUT,

Defendant.

COMPLAINT

Plaintiffs, by their undersigned attorneys, allege upon knowledge as to themselves, and otherwise upon information and belief, as follows:

Nature of the Action

1. By this action, plaintiffs seek injunctive relief as well as a declaration pursuant to the federal Declaratory Judgments Act, 28 U.S.C. §§ 2201 *et seq.*, that an actual controversy exists between the plaintiffs and defendant and that the

lawsuit that has been imminently threatened by defendant against plaintiffs, purportedly to recover certain Medicaid payments made by the State of Connecticut, would violate plaintiffs' rights under the United States Constitution and federal statutes.

2. This action seeks to prevent defendant from singling out a category of out-of-state manufacturers and imposing upon them a retroactive, unprecedented, and devastating financial burden in an effort to significantly impede the channels of interstate commerce to a lawful product — cigarettes — at the expense of plaintiffs' federal constitutional and statutory rights.

Jurisdiction and Venue

3. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1343, and 28 U.S.C. § 1367. Venue is proper in this District under 28 U.S.C. § 1391(b).

Parties

4. Plaintiff Philip Morris Incorporated, a manufacturer of cigarettes, is a Virginia corporation whose principal place of business is 120 Park Avenue, New York, New York 10017.

5. Plaintiff R.J. Reynolds Tobacco Company, a manufacturer of cigarettes, is a New Jersey corporation whose principal place of business is 4th and Main Street, Winston-Salem, North Carolina 27102.

6. Plaintiff Brown & Williamson Tobacco Corporation, a manufacturer of cigarettes, is a Delaware corporation whose principal place of business is 1500 Brown & Williamson Tower, Louisville, Kentucky 40202.

7. Plaintiff Lorillard Tobacco Company, a manufacturer of cigarettes, is a Delaware corporation whose principal place of business is 1 Park Avenue, New York, New York 10016.

8. Defendant Richard Blumenthal is the Attorney General of Connecticut.

Background

9. For months, defendant has been preparing to bring on behalf of the State of Connecticut a lawsuit (the "Threatened Lawsuit") seeking hundreds of millions of dollars from plaintiffs, which are cigarette manufacturing companies that are incorporated and have their principal place of business outside of Connecticut. The theory of the Threatened Lawsuit is that, under various provisions and/or principles of state law, plaintiffs should be required — both retroactively and prospectively — to pay for Medicaid payments that Connecticut voluntarily undertook to make to its Medicaid-eligible residents, wholly irrespective of whether plaintiffs would have any liability under established principles of law to pay for the medical care of any actual Medicaid recipient.

10. The Threatened Lawsuit would have purported to have been authorized by a bill which was introduced in the Connecticut General Assembly in the 1996 session but failed to be enacted into law (the "Failed Bill"). The Failed Bill (1996 House Bill 5817) would have provided that:

> The state of Connecticut may recover against *any manufacturer of tobacco products* the full amount of medical assistance provided by the state of Connecticut . . . which is attributable to the use of cigarettes or other tobacco products pursuant to the Title XIX Medicaid program, and reasonable attorney's fees and costs. The state's rights under this section are *independent of any rights or causes of action of the recipient or applicant.* In an action brought pursuant to this section, *the issue of causation may be proven by epidemiological studies or statistical evidence and the contributory negligence, comparative negligence or assumption of risk of the applicant or recipient shall not bar recovery nor dimin-*

> *ish the award of damages*. The portion of the costs of medical assistance provided by the state of Connecticut which are attributable to the manufacturer of tobacco products shall be presumed to be equivalent to the portion of total sales, in this state, of such product that are attributable to the manufacturer for the period of time for which reimbursement is sought. (emphasis added)

The Failed Bill contained the following "Statement of Purpose": "To *authorize* the Attorney General to bring an action against any manufacturer of tobacco products to recover the costs of medical assistance that is attributable to the use of cigarettes or other tobacco products." (emphasis added)

11. Notwithstanding that the Failed Bill — which on its face would have purported to "authorize" the Attorney General to bring the Threatened Lawsuit — was *not* enacted into law, defendant nonetheless is proceeding with his plan to bring the Threatened Lawsuit. In his testimony before the Judiciary Committee concerning the Failed Bill, defendant proclaimed that the Failed Bill would merely "put in statute *the current state of the common law*" (emphasis added). According to the defendant's testimony, both the Failed Bill and the "current state of the common law" (as interpreted by defendant) (i) "clearly authorize the Attorney General to bring an action to recoup . . . health care expenses caused by tobacco products"; (ii) "allow the state to prove causation between the tobacco product and the disease by statistical evidence or epidemiological studies"; (iii) "prohibit[ ] the defense of contributory/comparative negligence or assumption of risk of the patient by the tobacco company"; and (iv) "apportion damages among the tobacco industry based on market share of the tobacco companies."

12. Defendant will claim in the Threatened Lawsuit that the State is entitled to recover Medicaid payments from plaintiffs (i) on a retroactive basis, and (ii) without regard to some or all of the elements of proof that any actual Medicaid recipient would be required to establish to recover medical costs

from plaintiffs, and some or all of the defenses that plaintiffs would have against any actual Medicaid recipient. This is apparent from, among other things, (i) published reports concerning public statements made by defendant regarding the nature and magnitude of claims that the defendant is planning to assert in the Threatened Lawsuit (as alleged below at ¶¶ 41-47); (ii) the testimony of the Attorney General before the Judiciary Committee on the Failed Bill (quoted in part above at ¶ 11); and (iii) the fact that defendant is acting in concert with Attorneys General of several other states who have brought similar suits, who have all sought to impose liability retroactively and without regard to whether any individual Medicaid recipient would have any claim against any cigarette manufacturer (as alleged below at ¶¶ 14-15).

13. The threatened conduct of defendant violates fundamental principles of federal constitutional law. Plaintiffs are entitled to injunctive relief barring the defendant from bringing, prosecuting, or imposing or enforcing liability pursuant to the Threatened Lawsuit, as well as a declaration that the Threatened Lawsuit violates plaintiffs' federal constitutional and statutory rights.

14. In the past two years, nine similar lawsuits have been brought by the Attorneys General of nine other states: Florida, Mississippi, Minnesota, West Virginia, Massachusetts, Louisiana, Texas, Maryland, and Washington. In each of those suits, the Attorneys General have sought to impose liability retroactively — in the Minnesota case, all the way back to 1977 — and have taken the position that liability may be assessed without regard to whether any individual Medicaid recipient would have any claim against any tobacco company. With the assistance of the Attorneys General that have already brought suit and various anti-tobacco groups, defendant is preparing to bring suit as well. On April 1, 1996, the *Reuters News Service* quoted Attorney General Blumenthal as saying that he was "very close" to bringing suit. And on May 2, 1996, the *New York Times* reported that Connecti-

cut had publicly "announced [its] plans yesterday to sue the tobacco industry." The *New York Times* article reported that, according to Attorney General Blumenthal, the suit "would seek hundreds of millions of dollars in damages."

15. Defendant, in preparing to bring the Threatened Lawsuit, is acting in concert with the Attorneys General who have brought similar suits thus far, anti-tobacco groups, and others. As was reported by the *States News Service* on March 25, 1996, defendant attended the spring meeting of the National Association of Attorneys General to "consult and plot strategy with . . . colleagues who have already filed similar suits."

16. The Threatened Lawsuit violates basic principles of constitutional law under the United States Constitution. The Threatened Lawsuit seeks to impose upon plaintiffs on a retroactive basis massive costs of the Medicaid program that Connecticut has voluntarily chosen to establish, irrespective of traditional principles of law governing the rights and duties of plaintiffs with respect to any actual Medicaid recipient.

17. Innumerable factors may contribute to the costs of Medicaid: inefficiency and/or corruption in the state system; random (and often reckless) individual choices such as driving over the speed limit; the pervasiveness of air pollution; automobiles; handguns; alcohol; unhealthy foods; and so on. Moreover, myriad business decisions and government policies that make individuals unable to rise economically above the Medicaid level contribute substantially to the costs of Medicaid — for example, low wages, plant closings and job eliminations that leave employees unable to pay their own medical bills. Connecticut's attempt to impose massive costs upon out-of-state cigarette manufacturers without regard to pre-established tort law principles and defenses is arbitrary and violates the United States Constitution.

18. Moreover, notwithstanding the publicly articulated views of many going back a century or more that smoking

tobacco is injurious to health, cigarettes have expressly been sanctioned as an article of interstate commerce; have been regulated (but not prohibited); and have been utilized as a revenue-producing vehicle both by the United States Government and the individual states, including Connecticut.

19. Indeed, in 1994 alone, Connecticut generated over $118 million in revenue from state cigarette taxes, and Connecticut has since 1965 (the year the federal Medicaid Act was enacted and the first year Connecticut chose to participate in Medicaid) generated over *two billion* dollars in state cigarette taxes. Connecticut's retroactive attempt to shift the burden of Medicaid costs it has voluntarily undertaken to make to out-of-state manufacturers of a lawful product that the state has for many years countenanced, regulated and from which it has generated enormous revenues through taxation is unlawful.

20. Congress struck a careful balance in the Federal Cigarette Labeling and Advertising Act of 1965 and its successor, the Public Health Cigarette Smoking Act of 1969, among (i) recognizing the importance of cigarettes to our national economy and the economies of tobacco growing and manufacturing states by facilitating the sale of cigarettes in interstate commerce; (ii) providing that a warning label be placed on each package of cigarettes; and (iii) allowing individual customers to exercise their personal freedom of choice to smoke or not to smoke. Congress mandated that a warning label be placed on all cigarette packages sold in the United States, but that cigarette packages so labeled could be sold in the United States free of all state "requirements or prohibitions" based on smoking and health with respect to, *inter alia*, the promotion of cigarettes. In enacting these statutes, Congress expressly stated as one of its purposes that "commerce and the national economy . . . be protected to the maximum extent consistent with [the] declared policy" of "adequately inform[ing] [the public] that cigarette smoking may be hazardous to health." 15 U.S.C. § 1331. Subsequently,

the Supreme Court has expressly recognized that lawsuits seeking damages constitute "requirements or prohibitions" by the states within the meaning of these federal statutes. *See Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608 (1992).

21. The potential impact of the Threatened Lawsuit on interstate commerce is enormous and far reaching. The Threatened Lawsuit (like the other similar lawsuits in other states) seeks unlawfully to significantly impede interstate commerce in cigarettes. While the individual states could not constitutionally legislate this result directly, these lawsuits attempt to shift retroactively massive costs of the Medicaid program to plaintiffs and arbitrarily to impose on plaintiffs massive ongoing costs.

22. Even if the provisions of Connecticut Law relied upon by defendant were construed to apply only prospectively, they would still (as otherwise interpreted by defendant) constitute an improper and illegal burden on interstate commerce by imposing massive ongoing costs upon the plaintiffs. In light of the inherent mobility of the American population, the constitutional right to travel, and the ability to purchase cigarettes in neighboring states, plaintiffs could not insulate themselves from the draconian liability sought to be imposed by defendant (or the other states in which Attorneys General have brought suit).

23. The Threatened Lawsuit, and the provisions of Connecticut Law relied upon by defendant as interpreted by him, violate plaintiffs' rights under the United States Constitution. As further set forth below, they constitute an improper and illegal attempt by the State to burden interstate commerce, violate plaintiffs' rights under the Due Process Clause, Equal Protection Clause, Taking Clause, and plaintiffs' First Amendment rights. Moreover, the Threatened Lawsuit and the provisions of Connecticut Law relied upon by defendant (as interpreted by him) violate the Supremacy Clause because they are preempted by and inconsistent with the federal Med-

icaid Act and the Public Health Cigarette Smoking Act of 1969.

24. Plaintiffs are entitled to injunctive relief barring the defendant from prosecuting, imposing or enforcing liability pursuant to the Threatened Lawsuit. Plaintiffs are also entitled to a declaration that the threatened conduct of defendant is in violation of plaintiffs' constitutional rights and federal statutory rights, and that the provisions of Connecticut Law relied upon by defendant, if construed in the manner in which defendant will claim in the Threatened Lawsuit, are unconstitutional.

The Medicaid Program

25. By virtue of the Threatened Lawsuit, defendant seeks to recover from plaintiffs payments voluntarily made by Connecticut under the program established under Title XIX of the Social Security Act, commonly known as the Medicaid Act, 42 U.S.C. § 1396 *et seq*. Under the Medicaid Act, participating states receive federal financial assistance for administering a medical treatment program in accordance with the requirements of the comprehensive federal scheme set forth in the Medicaid Act and regulations promulgated thereunder.

26. Under the Medicaid Act, no state is obligated to participate in the Medicaid program. However, states that choose to participate in the Medicaid program, and thus who seek to become eligible for federal funding, must develop a state plan that conforms with the comprehensive federal requirements. The state plan must be approved by the United States Department of Health and Human Services. 42 U.S.C. §§ 1396a, 1396c. Connecticut has since 1965 chosen to participate in the federal Medicaid program.

27. The percentage of federal funds available to each state under the federal Medicaid program varies from state to state based upon a federal formula that takes into account the per

capita income of residents of the state as compared to the national average. In 1994, the federal government paid 50% of the funds relating to Connecticut's participation in the Medicaid program, and the federal government pays for some states up to 80% of the funds applicable to their participation.

28. In recognition of the fact that the United States government provides the major source of funding for the Medicaid programs throughout the country, the Medicaid Act and the regulations thereunder create a detailed system for the recovery of monies paid out under the Medicaid program where third parties are found to be liable for their payment.

29. Thus, under the Medicaid Act and the regulations thereunder, a state Medicaid plan must provide that each recipient assign to a duly designated single state Medicaid agency his or her rights to payment for medical care from any third party. *See* 42 U.S.C. §§ 1396a(a)(45), 1396k; 42 C.F.R. §§ 433.145-.148. The single state agency, as the assignee of those rights, must take reasonable measures to determine the legal liability of third parties to pay for services furnished under the Medicaid plan to any recipient, and must fulfill the requirements of the Medicaid Act and regulations with regard to establishing liability and seeking reimbursement from third parties. *See* 42 U.S.C. § 1396a(a)(25), 42 C.F.R. §§ 433.135-.148.

30. The Medicaid Act and regulations also require that if a state receives reimbursement of Medicaid payments from a liable third party, the state must pay the federal government the applicable federal share of the reimbursement (net of an incentive payment to the state applicable under the regulations). *See* 42 U.S.C. § 1396b(d); 42 C.F.R. § 433.140(c); 42 C.F.R. § 433.154.

31. Under the applicable regulations, "[i]f the agency learns of the existence of a liable third party after a claim is paid . . . the agency must seek recovery of reimbursement within 60 days after the end of the month it learns of the exis-

tence of the liable third party." 42 C.F.R. § 433.139(d)(2). Reimbursement by the state agency "must be sought unless the agency determines that recovery would not be cost effective." 42 C.F.R. § 433.139(d)(3).

32. If the state agency fails to fulfill these or any of the other requirements with regard to establishing liability and seeking reimbursement from third parties, it loses its right to federal financial participation in Medicaid payments. 42 C.F.R. § 433.140(a)(1). Yet, despite this severe consequence for failing promptly to seek reimbursement from a third party, and despite widespread and longstanding public allegations that smoking leads to increased health care costs, the State of Connecticut has never in the over 30 years since the Medicaid Act was enacted sought to recover a single Medicaid payment from a cigarette manufacturer, or to bring any lawsuit similar to the Threatened Lawsuit against any third party purporting to act in a capacity "independent" of the rights of actual Medicaid recipients. Nor has any such suit ever been authorized anywhere in the country by the United States Department of Health and Human Services, the federal agency responsible for administering the Medicaid Act and regulations.

33. It is plain from the face of the Medicaid statute and the applicable regulations — and is confirmed by the actions of the state and federal agencies for over 30 years in administering the Act — that the federal statutory and regulatory framework contemplates only suits to recover costs of medical assistance from insurers or other third parties who are liable to individual Medicaid recipients. For example, there are detailed federal regulations regarding the establishment of paternity and recovery against out-of-wedlock fathers, and express requirements that recipients (among other things) release their medical records and appear as witnesses in court if needed. *E.g.*, 42 C.F.R. § 433.147. But nothing in the federal scheme discusses or remotely authorizes mass suits against an industry on any theory (much less one whereby the state could proceed without proof of any elements of an indi-

vidual Medicaid recipient's legal claim and without being subject to some or all of the defenses applicable to an individual Medicaid recipient's legal claim), or authorizes the states to single out any particular industry for disparate treatment.

The Connecticut State Medicaid Plan

34. The Connecticut State Medicaid Plan (the "State Plan") approved by the United States Department of Health and Human Services is not on its face inconsistent with the federal requirements discussed above.

35. Thus, the section of the State Plan entitled "Third Party Liability" states that "The Medicaid Agency meets all requirements of: (1) 42 C.F.R. 433.138 and 433.139; (2) 42 C.F.R. 433.145 through 433.148; (3) C.F.R. 433.151 through 433.154; [and] (4) Section 1902(a)(25)(H) and (I) of the Act." As discussed above, these sections provide (among other things) for each Medicaid recipient to assign to the state Medicaid agency his or her rights to payment for medical care from any third party; for the state agency to take reasonable measures as assignee of those rights to determine the legal liability of third parties to pay for services furnished under the Medicaid plan to any Medicaid recipient; for the state agency to seek recovery of reimbursement within 60 days after the end of the month it learns of the existence of a liable third party; and for the state to pay the federal government the applicable federal share of any monies recovered from third parties.

36. In addition, an Attachment incorporated by reference into the Connecticut state plan, in a section titled "Guidelines Used in Determining Whether to Seek Reimbursement from Liable Third Parties," states that the Connecticut State Agency responsible for administering the Medicaid program takes action "to recover payments in excess of $500 for claims associated with accident/casualty situations." How-

ever, as noted above, in the over 30 years that Connecticut has participated in Medicaid, and despite the widespread public assertions that smoking tobacco is injurious to health, no claim has ever been asserted by the Connecticut State Agency against any plaintiff herein seeking recovery for any medical service provided to any individual that was paid for by Medicaid.

The Applicable Connecticut Statutory Provisions

37. The Connecticut statutory provisions governing third party liability with regard to Medicaid payments likewise are on their face consistent with the federal requirements discussed above. Specifically, Conn. Stat. § 17b-265 provides:

> *In accordance with 42 U.S.C. § 1396k, the department of social services shall be subrogated to any right of recovery* or indemnification which an applicant or recipient of medical assistance or any legally liable relative has against a private insurer or other third party, as defined in 42 C.F.R. 433.136, for the cost of hospitalization, pharmaceutical services, physician services, nursing services and other medical services, not to exceed the amount expended by the department for such care and treatment of the applicant or recipient. An applicant or recipient or legally liable relative, *by the act of the applicant or recipient receiving medical assistance, shall be deemed to have made a subrogation assignment and an assignment of claim for benefits to the department.* . . . This subsection shall not be construed to affect *the right of an applicant or recipient to maintain an independent cause of action* against such third party tortfeasor. (emphasis added)

This provision is consistent with the federally mandated scheme set forth in 42 U.S.C. §§ 1396a(a)(45) and 1396k and 42 C.F.R. §§ 433.145-.148 whereby each Medicaid recipient is required to assign his/her rights to the single designated

state Medicaid agency, and this state agency is required to act as assignee of those rights to seek third party reimbursement. While this section permits an *individual Medicaid recipient* to "maintain an independent cause of action" against a third party, it does *not* permit the *state* to maintain an "independent cause of action" such as the Attorney General has threatened to bring by virtue of the Threatened Lawsuit, but rather provides for the duly designated state Medicaid agency to proceed by virtue of the assignment/subrogation mechanism mandated by the federal Medicaid Act.

38. Other provisions of Connecticut law likewise make clear that the assignment/subrogation scheme mandated by federal law is the mechanism pursuant to which the state is required to seek to recover Medicaid payments from third parties. Under Conn. Stat. § 17b-260, the Connecticut Medicaid program is required to be "administer[ed] in accordance with the requirements" of the federal Medicaid Act. And, under Conn. Stat. § 17b-264, state statutory provisions (including the third-party liability/subrogation provision quoted in ¶ 37, *supra*) are extended to the Connecticut Medicaid program only if they are not "inconsistent with federal law and regulations governing Title XIX of the Social Security Amendments of 1965 [*i.e.*, the federal Medicaid Act and regulations]."

39. The Connecticut State Medicaid Plan that has been approved by the United States Department of Health and Human Services, discussed above in ¶¶ 34-36, likewise is consistent with these federal requirements. Nothing in the State Plan remotely authorizes a lawsuit by the state "independent" of any right or cause of action assigned to it by any actual Medicaid recipient by virtue of the Medicaid Act and the regulations thereunder. Nor does anything in the State Plan authorize a lawsuit against a particular industry for Medicaid payments, or authorize the Attorney General to bring any lawsuit seeking to recover any Medicaid payments.

40. As noted above (¶ 10), despite the publicly-stated intention of defendant to bring the Threatened Lawsuit, the Connecticut Legislature has *not* adopted a proposed bill which would have at least on its face purported to have authorized the defendant to bring an action against tobacco companies seeking to recover Medicaid moneys, and to assert the claims that are threatened to be asserted in the Threatened Lawsuit. Thus, on March 13, 1996, Representative Ellen Scalettar sponsored a new bill (House Bill No. 5817) in the Connecticut General Assembly titled "An Act Concerning Recovery of State Costs for Treatment of Tobacco-Related Diseases." The "Statement of Purpose" of the bill was: "To *authorize* the Attorney General to bring an action against any manufacturer of tobacco products to recover the costs of medical assistance that is attributable to the use of cigarettes or other tobacco products." (emphasis added) The bill would have purported to give the state rights "independent of any rights or causes of action of the recipient or applicant," and would have provided that "the issue of causation may be proven by epidemiological studies or statistical evidence, and the contributory negligence, comparative negligence or assumption of risk of the applicant or recipient shall not bar recovery nor diminish the award of damages." But, despite testimony by the Attorney General in support of the Bill, House Bill No. 5817 was *not* enacted into law.

The Threatened Lawsuit by the Connecticut Attorney General

41. The Connecticut Attorney General has for months been preparing to file the Threatened Lawsuit against plaintiffs to recover Medicaid-related payments, purporting to act not simply as subrogee or assignee of the individual recipients in conformity with the federal requirements under the Medicaid Act and the state statutory provisions incorporating those federal requirements, but in an "independent" capacity.

42. Thus, on March 25, 1996, the *Connecticut Law Tribune* reported that defendant was "close to bringing suit against the tobacco industry to recover state costs for tobacco-related illnesses — if the General Assembly backs the gambit." This report stated that defendant had "proposed to the Judiciary Committee . . . changes in state law [House Bill 5817, discussed in ¶¶ 10-11, 40, above] that would strengthen Connecticut's position in court by blocking the tobacco industry's defenses in litigation." Defendant was quoted as saying that he was "preparing actively for a lawsuit", and that such a lawsuit would "probably" not be filed "before the [current legislative] session ends [May 8, 1996] and until we know if the General Assembly will approve some or all of the measures we have asked for [in House Bill 5817]."

43. Also on March 25, 1996, the *State News Service* reported that "Connecticut could file a lawsuit against the major tobacco companies within several weeks, seeking millions in repayment for Medicaid and Medicare expenses for tobacco-related illnesses." This report quoted defendant as saying that it was "morally reprehensible" for taxpayers to bear the costs of diseases attributable to smoking, and that the Threatened Lawsuit would seek "to recover for Connecticut taxpayers" health care costs "borne for years now" attributed to smoking, which defendant estimated as "$900 million".

44. On April 1, 1996 the *Reuters News Service* quoted defendant as saying "I think we are very close" to filing suit.

45. Although the Failed Bill was not enacted into law, defendant nevertheless has publicly announced that he still intends to proceed with the Threatened Lawsuit. Thus, on May 2, 1996, the *New York Times* reported that Connecticut had "announced [its] plans yesterday to sue the tobacco industry." The *New York Times* report stated that, according to defendant, the suit "would seek hundreds of millions of dollars in damages."

46. On May 6, 1996, the *Connecticut Law Tribune* reported that defendant had "filed notices with newspapers across the state, including the Connecticut Law Tribune, seeking proposals for law firms to work with his office on the suit" on a contingency fee basis. The report stated that such proposals were due to be received by the Attorney General on or before May 20, and that the Attorney General "hope[d] to file the suit by late spring or early summer."

47. In a May 27, 1996 article in the *Connecticut Law Tribune* entitled "A Piece of the Action," it was reported that defendant had received 14 proposals from law firms seeking to be hired on a contingency fee basis to bring the Threatened Lawsuit, and defendant was quoted as saying that he planned "to make a choice among them . . . some time in June."

Plaintiffs' Need for Declaratory and Injunctive Relief

48. Plaintiffs need the declaratory and injunctive relief sought herein in order to settle and protect their reasonable investment-backed expectations and economic rights to continue to manufacture and sell cigarettes in the United States free from unconstitutional and illegal imposition of liability. The Threatened Lawsuit and the provisions of Connecticut Law upon which defendant relies, as interpreted by the defendant, place into question plaintiffs' liability for past, present and future sale of their products in interstate commerce and will (if held to be constitutional) necessarily affect plaintiffs' business on a going-forward basis. Plaintiffs believe that the Threatened Lawsuit and the provisions of Connecticut Law upon which defendant relies as interpreted by defendant are plainly unconstitutional, but defendant contends to the contrary. Plaintiffs are entitled to a declaration on this issue so that Plaintiffs' legal rights and any questions about their liability for past, present and future sales are resolved and so that they may determine whether the claims in the Threatened Lawsuit and the provisions of Connecticut Law upon which

defendant relies will have any effects on their businesses and, if necessary, take appropriate actions. It is anticipated that defendant will bring the Threatened Lawsuit in state court, and plaintiffs are entitled to have a federal court resolve the federal constitutional and statutory claims raised herein. In addition, the Threatened Lawsuit and the provisions of Connecticut Law upon which defendant relies, as interpreted by the defendant, raise the spectre of massive liability. Plaintiffs are entitled to injunctive relief barring defendant from prosecuting, imposing or enforcing liability pursuant to the Threatened Lawsuit.

First Claim for Relief
(Commerce Clause)

49. Plaintiffs repeat and reallege paragraphs 1 through 48 hereof.

50. The Threatened Lawsuit and the provisions of Connecticut Law upon which defendant relies, as interpreted by defendant, would impose a severe burden on interstate commerce by shifting to plaintiffs massive costs of the state Medicaid program voluntarily undertaken by Connecticut. The effect of the Threatened Lawsuit (and the similar pending lawsuits in other states) and the provisions of Connecticut Law upon which defendant relies, as interpreted by defendant, would be to impose ongoing massive costs upon the plaintiffs and adversely impact the sale of cigarettes in interstate commerce. In light of the inherent mobility of the American population, the Constitutional right to travel, and the ability to purchase cigarettes in neighboring states, plaintiffs could not insulate themselves from the draconian liability sought to be imposed by defendant (or the Attorneys General of the other states that have brought suit).

51. Moreover, Connecticut has sought to impose these massive costs on cigarettes — a product manufactured outside the State of Connecticut.

52. The principles of state law relied upon by defendant in the Threatened Lawsuit, as interpreted by the defendant, constitute an improper interference by Connecticut in interstate commerce in violation of the Commerce Clause of the United States Constitution, U.S. Const. Art. I, § 8, cl. 3.

Second Claim for Relief
(Due Process)

53. Plaintiffs repeat and reallege paragraphs 1 through 48 hereof.

54. The Threatened Lawsuit and the provisions of Connecticut Law upon which defendant relies, as interpreted by defendant, seek to relieve the State of Connecticut of its own voluntarily-undertaken obligations (by choosing to participate in the Medicaid program) to pay Medicaid expenses to Medicaid-eligible individuals, at the expense of severely impairing the rights of plaintiffs, which are all out-of-state businesses.

55. As interpreted by defendant, the provisions of Connecticut Law upon which defendant relies in the Threatened Lawsuit entitle the State of Connecticut to recover Medicaid payments from plaintiffs (i) on a retroactive basis, and (ii) without regard to some or all of the elements of proof that any actual Medicaid recipient would be required to establish to recover medical costs from plaintiffs, and some or all of the defenses that plaintiffs would have against any actual Medicaid recipient. Defendant intends to impose this massive and radical departure from law on cigarettes — a lawful product — to the exclusion of numerous other products and activities that may contribute to the costs of Medicaid. Defendant seeks retroactively to impose liability on plaintiffs arising from past conduct that the state has for many years countenanced and regulated and from which it has generated enormous revenue through taxation.

56. The provisions of Connecticut Law upon which defendant relies in the Threatened Lawsuit, as interpreted by defendant, are invalid under the Fourteenth Amendment to the United States Constitution, in that they permit a deprivation of property without due process of law.

57. The provisions of Connecticut Law upon which defendant relies in the Threatened Lawsuit, as interpreted by defendant, are unconstitutional for the further reason that the manner in which they are sought to be applied by defendant deprives plaintiffs of their property without due process of law in violation of the Fourteenth Amendment to the United States Constitution.

Third Claim for Relief
(Equal Protection)

58. Plaintiffs repeat and reallege paragraphs 1 through 48 hereof.

59. Despite the fact that there are myriad factors that may contribute to the costs of Medicaid, the provisions of Connecticut Law upon which defendant relies in the Threatened Lawsuit, as interpreted by defendant, arbitrarily seek to impose massive costs upon cigarette manufacturers retroactively and prospectively without regard to established legal principles and irrespective of any rights and defenses cigarette manufacturers would have against any actual Medicaid recipient.

60. The provisions of Connecticut Law upon which defendant relies in the Threatened Lawsuit, as interpreted by defendant, violate plaintiffs' rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Fourth Claim for Relief
(Supremacy Clause; Medicaid Preemption)

61. Plaintiffs repeat and reallege paragraphs 1 through 48 hereof.

62. The provisions of Connecticut Law upon which defendant relies in the Threatened Lawsuit, as interpreted by defendant, are in conflict with (and are thus preempted by) the Medicaid Act and regulations, including but not limited to in the following respects: (1) by allowing the state to sue in a capacity "independent" of the rights of actual Medicaid recipients, rather than pursuant to the assignment/subrogation scheme mandated by federal law; (2) by allowing the state to bring a mass suit rather than a suit relating to specific individual Medicaid recipients; (3) by allowing the state to bring a mass suit against companies in a particular industry; (4) by allowing the state to sue beyond the 60-day limitations period mandated by 42 C.F.R. § 433.139(d)(2); (5) by allowing the state to bring a suit not authorized by the State Medicaid Plan approved by the United States Department of Health and Human Services; and (6) by permitting the Attorney General to bring suit against the cigarette manufacturers in violation of the "single State agency" requirement of federal law.

63. In addition, in light of the comprehensive scheme established by the federal Medicaid Act and the regulations promulgated thereunder, even apart from specific conflicts (including those enumerated in ¶ 62 above), the provisions of Connecticut Law upon which defendant relies in the Threatened Lawsuit, as interpreted by defendant, are preempted by the Medicaid Act and regulations thereunder.

64. Further, as described above, under the comprehensive system set forth in the Medicaid Act and regulations promulgated thereunder, Connecticut is only authorized to bring against plaintiffs claims for third-party liability for Medicaid payments with respect to the rights (if any) that individual Medicaid recipients might have against plaintiffs. Accord-

ingly, the provisions of Connecticut Law upon which defendant relies, to the extent that they purport to authorize an "independent cause of action" in favor of the State of Connecticut, conflict with the Medicaid Act and regulations thereunder.

65. Accordingly, the provisions of Connecticut Law upon which defendant relies in the Threatened Lawsuit are inconsistent with and preempted by the Medicaid Act and regulations thereunder and violate the Supremacy Clause of the United States Constitution.

Fifth Claim for Relief
(Supremacy Clause; Preemption Under the Public Health Cigarette Smoking Act of 1969)

66. Plaintiffs repeat and reallege paragraphs 1 through 48 hereof.

67. In enacting the Federal Cigarette Labeling and Advertising Act of 1965 and its successor, the Public Health Smoking Act of 1969, Congress struck a careful balance among (i) recognizing the importance of cigarettes to our national economy and the economies of tobacco growing and manufacturing states by facilitating the sale of cigarettes in interstate commerce; (ii) providing that a warning label be placed on each package of cigarettes; and (iii) allowing individual customers to exercise their personal freedom of choice to smoke or not to smoke. Congress required that the statement "WARNING: THE SURGEON GENERAL HAS DETERMINED THAT CIGARETTE SMOKING IS DANGEROUS TO YOUR HEALTH" (or a variation thereof) be printed in a prominent place on all packages of cigarettes sold in the United States. In addition, Section 5(b) of the Public Health Cigarette Smoking Act of 1969 provided that "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled

in conformity with the provisions of this chapter." 15 U.S.C. § 1334.

68. Congress expressly stated that one of its purposes for providing for uniform warnings and in preempting any other state law "requirements or prohibitions" as aforesaid was that "commerce and the national economy . . . be protected to the maximum extent consistent with [the] declared policy" of "adequately inform[ing] [the public] that cigarette smoking may be hazardous to health." 15 U.S.C. § 1331. The Supreme Court has held that lawsuits seeking damages constitute "requirement[s] or prohibition[s]" by the states within the meaning of these federal statutes. *See Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608 (1992).

69. The Threatened Lawsuit and the provisions of Connecticut Law upon which defendant relies (as interpreted by defendant) impose a "requirement or prohibition" based on smoking and health with respect to the promotion and advertising of cigarettes by seeking to impose massive costs of the state Medicaid program upon plaintiffs irrespective of plaintiffs' rights and duties with respect to any actual Medicaid recipient.

70. The provisions of Connecticut Law upon which defendant relies in the Threatened Lawsuit, as interpreted by defendant, are accordingly preempted by the Public Health Cigarette Smoking Act of 1969 and violate the Supremacy Clause of the United States Constitution.

Sixth Claim for Relief
(Taking of Property)

71. Plaintiffs repeat and reallege paragraphs 1 through 48 hereof.

72. The Threatened Lawsuit and the provisions of Connecticut Law upon which defendant relies, as interpreted by defendant, by seeking to extract from cigarette manufacturers

Medicaid payments retroactively and prospectively without regard to established legal principles and irrespective of any rights and defenses cigarette manufacturers would have against any actual Medicaid recipient, would create a severe economic impact upon plaintiffs and greatly interfere with plaintiffs' settled investment-backed expectations.

73. The nature of the state's action through the Threatened Lawsuit and the provisions of Connecticut Law upon which defendant relies, as interpreted by defendant, would constitute in essence a confiscation of plaintiffs' property by the state.

74. The provisions of Connecticut Law upon which defendant relies in the Threatened Lawsuit, as interpreted by defendant, violate plaintiffs' rights under the Taking of Property Clause of the Fifth Amendment to the United States Constitution which is made applicable to the states under the Fourteenth Amendment to the United States Constitution.

Seventh Claim for Relief
(First Amendment)

75. Plaintiffs repeat and reallege paragraphs 1 through 48 hereof.

76. Despite the fact that the United States Surgeon General had concluded in 1964 that smoking cigarettes is not an "addiction," defendant will claim in the Threatened Lawsuit that plaintiffs violated state law by contesting the highly-publicized assertions going back at least to the 1960s by certain government officials (including the Surgeon General in 1988), anti-tobacco groups, and others that nicotine, a substance found naturally in tobacco and cigarettes, is "addictive."

77. Plaintiffs have the right under the First Amendment of the United States Constitution to express their views on this public issue. State laws or actions may not constitutionally be used to stifle debate on controverted public issues so as to enshrine the government's side of a disputed issue as official

orthodoxy, with any dissent being proscribed as "fraud." Nor may the state impose massive confiscatory penalties for plaintiffs' expression of disagreement with the views of government officials on this issue, with the monies extracted by the state being used to reinforce the state's views on this issue through anti-smoking programs and campaigns that are contrary to the views held by such manufacturers, who would thus be compelled to pay for speech with which they disagree.

78. The provisions of Connecticut Law upon which defendant relies in the Threatened Lawsuit, as interpreted by defendant, would deprive plaintiffs of their rights under the First and Fourteenth Amendments to the United States Constitution.

Eighth Claim for Relief
(Deprivation of Plaintiffs' Constitutional and Federal Law Rights Under Color of State Law)

79. Plaintiffs repeat and reallege paragraphs 1 through 48 hereof.

80. Defendant has been acting in concert and with the encouragement and substantial assistance of certain anti-tobacco activists, Attorneys General in certain other states, members of plaintiffs' contingency fee bar, and others in preparing the Threatened Lawsuit and in seeking to foster similar lawsuits by other like-minded Attorneys General as part of an effort that would, if successful, deprive plaintiffs of rights secured by the Constitution and laws of the United States as alleged above.

81. The provisions of Connecticut Law upon which defendant relies in the Threatened Lawsuit, as interpreted by defendant, would deprive plaintiffs of rights secured by the Constitution and laws of the United States under color of state law in violation of 42 U.S.C. § 1983.

Ninth Claim for Relief
(Connecticut State Constitutional, Statutory, and Common Law Claims)

82. Plaintiffs repeat and reallege paragraphs 1 through 48 hereof.

83. This claim for relief raises various grounds arising under the Connecticut State Constitution, Connecticut statutes, and Connecticut common law if and to the extent that such grounds may properly be presented in federal court and are cognizable by this Court in this action.

84. The provisions of Connecticut Law upon which defendant relies should not be construed to provide that the State is entitled to recover medical assistance payments from plaintiffs (i) on a retroactive basis; or (ii) without proof of each element of an individual Medicaid recipient's legal claim and without being subject to each of the defenses applicable to an individual Medicaid recipient's legal claim.

85. The Threatened Lawsuit, the claims to be asserted in the Threatened Lawsuit, and the provisions of Connecticut Law upon which defendant relies (as interpreted by defendant) violate or are precluded by the Connecticut State Constitution, Connecticut statutes, and Connecticut common law with respect to the following provisions thereof, among others: (a) equal protection under the Connecticut Constitution Article First, Sections 1 and 20; (b) liberty of speech under the Connecticut Constitution Article First, Sections 4 and 5; (c) due process protection under the Connecticut Constitution Article First, Sections 8, 9 and 10; (d) protection against the taking of property without just compensation under the Connecticut Constitution Article First, Section 11; (e) separation of powers under the Connecticut Constitution Article Second; (f) statutory limits on defendant's authority, including but not limited to those contained in Title 3 and Title 4 of the Connecticut General Statutes; and (g) Connecticut common law principles, including but not limited to principles of laches, unclean hands, waiver, estoppel, and mitigation of damages.

WHEREFORE, plaintiffs respectfully demand judgment as follows:

A. On their First Claim for Relief, declaring that the provisions of Connecticut Law upon which defendant relies in the Threatened Lawsuit, as interpreted by defendant, violate the Commerce Clause of the United States Constitution, and permanently enjoining the defendant from prosecuting, imposing or enforcing liability pursuant to the Threatened Lawsuit.

B. On their Second Claim for Relief, declaring that the provisions of Connecticut Law upon which defendant relies in the Threatened Lawsuit, as interpreted by defendant, are invalid, and unconstitutional as applied to plaintiffs, under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and permanently enjoining the defendant from prosecuting, imposing or enforcing liability pursuant to the Threatened Lawsuit.

C. On their Third Claim for Relief, declaring that the provisions of Connecticut Law upon which defendant relies in the Threatened Lawsuit, as interpreted by defendant, violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and permanently enjoining the defendant from prosecuting, imposing or enforcing liability pursuant to the Threatened Lawsuit.

D. On their Fourth Claim for Relief, declaring that the provisions of Connecticut Law upon which defendant relies in the Threatened Lawsuit are preempted by the Medicaid Act and the regulations promulgated thereunder and violate the Supremacy Clause of the United States Constitution, and permanently enjoining the defendant from prosecuting, imposing or enforcing liability pursuant to the Threatened Lawsuit.

E. On their Fifth Claim for Relief, declaring that the provisions of Connecticut Law upon which defendant relies in the Threatened Lawsuit, as interpreted by defendant, are preempted by the Public Health Cigarette Smoking Act of 1969

and violate the Supremacy Clause of the United States Constitution, and permanently enjoining the defendant from prosecuting, imposing or enforcing liability pursuant to the Threatened Lawsuit.

F. On their Sixth Claim for Relief, declaring that the provisions of Connecticut Law upon which defendant relies in the Threatened Lawsuit, as interpreted by defendant, violate the Taking of Property Clause of the Fifth Amendment to the United States Constitution, which is made applicable to the States under the Fourteenth Amendment to the United States Constitution, and permanently enjoining the defendant from prosecuting, imposing or enforcing liability pursuant to the Threatened Lawsuit.

G. On their Seventh Claim for Relief, declaring that the provisions of Connecticut Law upon which defendant relies in the Threatened Lawsuit, as interpreted by defendant, violate the First and Fourteenth Amendments to the United States Constitution, and permanently enjoining the defendant from prosecuting, imposing or enforcing liability pursuant to the Threatened Lawsuit.

H. On their Eighth Claim for Relief, declaring that the provisions of Connecticut Law upon which defendant relies in the Threatened Lawsuit, as interpreted by defendant, would deprive plaintiffs of rights secured by the Constitution and Laws of the United States under color of state law, in violation of 42 U.S.C. § 1983, and permanently enjoining the defendant from prosecuting, imposing or enforcing liability pursuant to the Threatened Lawsuit.

I. On their Ninth Claim for Relief, declaring that the Threatened Lawsuit, the claims to be asserted therein, and the provisions of Connecticut Law upon which defendant relies, as interpreted by defendant, violate the Connecticut State Constitution, Connecticut statutes, and Connecticut common law in the respects set forth in the Ninth Claim for Relief, and to the extent that such an injunction premised on such violations may properly be sought and is cognizable by this Court,

permanently enjoining the defendant from prosecuting, imposing or enforcing liability pursuant to the Threatened Lawsuit.

J. Awarding plaintiffs their costs and disbursements, including reasonable attorneys' fees, incurred in connection with this action.

K. Awarding plaintiffs such other and further relief as to the Court may seem just and proper.

Dated: June 28, 1996

Respectfully submitted,

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